(3)

No. 96-1693

In The

Supreme Court of the United States

October Term, 1997

FRANK X. HOPKINS, Warden,
Nebraska State Penitentiary,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

April 1, 1981: The respondent is found guilty by a jury of two counts of first-degree murder, case found at Docket 56, Page 139 in the District Court of Lancaster County, Nebraska.

September 11, 1981: A three-judge panel sentences the respondent to death.

January 20, 1984: The Supreme Court of Nebraska affirms the respondent's convictions and sentences. State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984).

November 13, 1984: The Supreme Court of the United States denies certiorari. Reeves v. Nebraska, 469 U.S. 1028 (1984).

November 13, 1990: The Supreme Court of the United States remands the cause to the Supreme Court of Nebraska for further consideration in light of Clemons v. Mississippi, 494 U.S. 738 (1990). Reeves v. Nebraska, 498 U.S. 964 (1990).

November 8, 1991: The Supreme Court of Nebraska balances the aggravating and mitigating circumstances anew and determines that sentences of death remain the appropriate penalties. State v. Reeves, 239 Neb. 419, 476 N.W.2d 829 (1991).

October 5, 1992: The Supreme Court of the United States denies certiorari. Reeves v. Nebraska, 506 U.S. 837 (1992).

December 26, 1996: A unanimous three-judge panel of the United States Court of Appeals for the Eighth Circuit grants the respondent a conditional writ of habeas corpus. Reeves v. Hopkins, 102 F.3d 977 (8th Cir. 1996), *reh'g denied* February 27, 1997.

PRELIMINARY JURY
INSTRUCTION # 10

INSTRUCTION NO. 10

You will have nothing whatsoever to do with the punishment or disposition of the defendant in the event of his conviction. Therefore, in determining whether he is guilty or innocent, you have no right to take into consideration what punishment or disposition he may or may not receive in the event of his conviction.

GIVEN

/s/ D.E.D.
JUDGE DISTRICT COURT

(Found at page 207 of the Nebraska Supreme Court Transcript)

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[2060] Instruction Number 3 starts out, "The Information or the fact that the county attorney has filed an Information is not to be considered by you as evidence."

MR. LAHNERS: No objection.

MR. GOOS: No objection.

THE COURT: Instruction Number 4 sets out that the defendant is presumed to be innocent.

MR. LAHNERS: No objection, your Honor.

MR. GOOS: No objection.

THE COURT: The next one is mislabeled. It should be Number 5. The Court is rejecting the proposed Instruction Number 1 and Number 2 of the defendant to instruct the jury in regard to degrees of murder and manslaughter. The Court, in doing so, is taking into consideration the following cases: State v. Harris, State v. McDonald – Harris is 194 Neb. 74; State v. McDonald, 195 Neb. 625; State v. Casper, 192 Neb. 120; Garcia v. State, 159 Neb. 571; State v. MacAvoy, 144 Neb. 827. And none of those cases, they all being – and the Court has read State v. Montgomery, 191 Neb. 470. In all of those cases except the Montgomery case, the Court held that those were all cases that – homicides during the commission of the felony, and instructions were not given in some of those cases. It was ruled on specifically by the Supreme Court. In Montgomery v. State, there is some [2061] dicta to the effect that if the facts and circumstances permit that, and the evidence permits it, that it might be appropriate to give an instruction under certain conditions. And the Court finds that those conditions do not exist in

this case. Therefore, defendant's requested Instruction Number 2 is refused. Defendant's requested Instruction Number 1 is refused.

Okay. Now, the next one has been misnumbered, and that should be Number 5 instead of Number 4. And they will be consecutively misnumbered from here on out.

MR. GOOS: Your Honor, I wonder if I might be permitted to state the objections to – for the Defense to Instruction Number 5 –

THE COURT: You may do so.

MR. GOOS: As is proposed, or if the Court would prefer, I could wait until the end.

THE COURT: You may do so at the end, if you desire. That would be Instruction Number 5.

MR. GOOS: Yes.

THE COURT: Yes. We'll wait and come back to that.

MR. GOOS: All right.

THE COURT: I'm assuming that some of the grounds are that the Court is not instructing on the first degree, second degree, and manslaughter.

* * *

[2097] THE COURT: Anything else, Mr. Lahners?

MR. LAHNERS: Not on number 5.

THE COURT: It's satisfactory with the State?

MR. LAHNERS: Yes, sir.

THE COURT: Satisfactory with the defendant?

MR. GOOS: Well, Your Honor, it is with two exceptions.

THE COURT: All right.

MR. GOOS: First of all, I think to be consistent with the motion to strike which we filed against the Amended Information on the theory that there were really two crimes alleged in each count that we should object to it on the grounds that it does set out two crimes and that they should be separately numbered and stated. And secondly we object to the instruction because it does not include lesser offenses.

THE COURT: Any other objections?

MR. GOOS: No.

THE COURT: They are overruled.

MR. GOOS: Your Honor, could I state more fully –

THE COURT: Oh, you certainly may. You just go right to it.

MR. GOOS: I guess what I am stating now would be my objections to Instruction Number 5 for failing to include the lesser included offenses of second degree murder and manslaughter, [2098] and also I would ask the Court to take them as statements in support of our request that the Court grant Instructions Number 1 and 2 which were requested by the defense.

THE COURT: The Court has duly noted them and the objection is overruled. Do you want to explain anything else?

MR. GOOS: Well, I wanted to give the reason why –

THE COURT: You can give your reasons, go ahead.

MR. GOOS: One, we feel that by not including lesser included the defendant is deprived of his theory of the case. That is, he's deprived of a right to show or argue to the jury that he could not have been guilty of felony murder involving an attempted first degree sexual assault and therefore that he might be guilty of a lesser crime. For example, second degree murder or manslaughter.

Two, we submit the Court is disregarding the evidence that defendant could act intentionally at the time of the crimes including an intent to stab or use force. Three, that the defendant has been or will be deprived of a fair trial in that under the charges against the defendant in the Information intent and use of force were material elements and are material elements. And both defendant and the State have produced evidence on intent. The defendant has conceded the use of force. That is stabbing. And he has conducted his defense in light of those facts in the belief, now [2099] apparently erroneous, that a lesser included offense would be required in light of allegations contained in the Information as amended and upon which trial was had.

Four, defendant will be denied a fair trial and due process of law by virtue of all those matters just stated.

Five, we submit the Court is disregarding the fact that if all previous felony murder cases decided by the Nebraska Supreme Court there was no specific intent charge whereas in this case there was. And in addition in this case I think there are – is a general intent charge.

Six, we believe the Court is failing to take into account basic substantive changes in Nebraska law since past Supreme Court decisions on felony murder insofar as lesser included offenses are concerned. For example, the enactment of a different sexual – a different second degree murder statute, one containing no elements of malice and also the enactment of comprehensive statute on the inchoate crime of attempt which contains specific elements of intent that were, of course, set out in the Amended Information upon which trial was had.

Seven, the Court is, in effect, by refusing the lesser included offense of second degree murder, finding as a matter of law the defendant could not have intentionally caused the death of the victims by stabbing, and that he did not do so, notwithstanding there is evidence that he may have done so. [2100] Eight, defendant is and will be denied his right to have the facts in this case determined by a jury contrary to this rights under Nebraska statutes and the constitution of the United States and the constitution of Nebraska.

Nine, the Court's ruling and failure to include lesser included offenses is inconsistent with and contrary to the recent Nebraska court decisions. The recently decided cases of Tamburino, State v. Tamburino at 201 Neb. 703, 1978, which expanded the tests to be used in determining whether a lesser included offense should be given. And

also the case of State v. Johnson at 197 Neb. 216, a 1976 case, stating what is a lesser included offense.

Ten, not to give the lesser included offenses will deprive defendant of his right to argue to the jury that the evidence would permit them in this case to rationally infer that the defendant intentionally caused the death of either one or both of the victims.

Eleven, the Court is depriving defendant of the inference that he intentionally assaulted and stabbed either or both victims prior to any intent to sexually assault any person.

Twelve, we believe the failure to give lesser included offenses would, in the words of the case of Beck v. Alabama at 100 Supr. Crt. 2382, 1980, would enhance the risk of an unwarranted conviction.

And lastly we would like to inject an element of [2101] equal protection of the laws here, Judge, because it seems that under the Tamburino case and other similar cases and all criminal cases in this state where the evidence produces a rational basis for a verdict acquitting defendant of the offense charged and convicting him of a lesser charge that, because there is this rule that exists in all other offenses we say that it should exist in this case also and would constitute a denial of the equal protection of the laws.

Your Honor, just by way of argument in support of those, I guess what we are saying is that there is ample evidence in the record that would warrant this Court finding defendant guilty of second degree murder.

There's an absence of premeditation and just this afternoon Dr. Cohen testified that he believed that the defendant acted intentionally when he stabbed the girls and that he acted purposefully and that testimony in and by itself would, we think, warrant the Court in giving a lesser included of second degree murder. And we would earnestly ask the Court to reconsider on the question of whether there should be lesser included offenses given.

THE COURT: Mr. Lahners, any argument?

MR. LAHNERS: No, Your Honor. I think we've been over it pretty well previously.

THE COURT: In regard to the Supreme Court of this state it has held consistently as far as this Court is aware [2102] that when lesser included offenses are given they must contain some, if not all, of the elements or some of the elements charged in the principle offense. For instance, in murder in the first degree there is premeditation, deliberation and malice as well as intent. Second decree [sic] murder in this state only contains intent. Therefore, on a premeditated murder, a second offense instruction, a manslaughter offense instruction is proper. Because manslaughter doesn't require any intent. However, in a felony murder case, which this Court considers this is, no intent is required in the killing where the act charged is murder while in the perpetration or killing while in the perpetration of a specified felony. In this case, sexual assault in the first degree or attempted sexual assault in the first degree. There is no intent required for killing.

If you go to the first degree murder by premeditation, deliberation, and second degree murder, then you

are going – you are putting in the element of intent on the killing. and no intent is required here. Therefore, there is no intent required.

The Court refers to the case of State v. MacAvoy as one of those cases where intent is not required in a murder and the perpetration of a felony. And some of the other cases the Court has researched, all of the cases that have been to the Supreme Court, felony murder, in some of those cases the [2103] court, where the issues is raided, has specifically held that the Court was proper in not granting the request to instruct on second degree murder and manslaughter. The objections are overruled,and Instruction Number 5 will be given in its present form if there's no objection to the form under the Court's theory.

MR. GOOS: Your Honor, there is no objection to the form under the Court's theory.

THE COURT: Yes.

MR. GOOS: I would like to just add one thing, and that is that it's our contention that the information contains a general – an allegation of a general intent when they alleged that he – the defendant intentionally overcame Janet Mesner by force and the force that was used in this case in the words, I think, of Mr. Lahners at an earlier conference in chambers, was part of the stabbing or the stabbing constituted part of force and the Supreme Court did, just recently, say in State v. Duis, D-u-i-s, at 207 Neb. 851, that assault with a dangerous instrument is a general intent crime. And really we believe that second degree murder is a general intent crime and would therefore fit within the context of the

allegations of the Information. I just wanted to add that, if I might.

THE COURT: Very well. The record will so show, and it is overruled.

INSTRUCTION NO. 2

This is a criminal action prosecuted by the State of Nebraska against the defendant, Randolph K. Reeves, upon an Amended Information containing two separate counts filed by the County Attorney of Lancaster County, Nebraska, pursuant to law.

The first count in the Amended Information charges in substance that:

> On or about the 29th day of March, 1980, in Lancaster County, Nebraska, the defendant, Randolph K. Reeves, did kill Janet L. Mesner in the perpetration of or attempt to perpetrate a sexual assault in the first degree against Janet L. Mesner, to-wit: he intentionally engaged in conduct, to-wit: overcame Janet L. Mesner by force, which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

The second court of the Amended Information charges in substance that:

> On or about the 29th day of March, 1980, in Lancaster County, Nebraska, the defendant, Randolph K. Reeves, did kill Victoria L. Lamm in the perpetration of or attempt to perpetrate a sexual assault in the first degree against Janet L. Mesner by force and subjected her to sexual penetration; or he intentionally engaged in conduct, to-wit: overcame Janet L. Mesner by force, which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K.

> Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

To each charge the defendant has entered a plea of not guilty and not guilty by reason of insanity or mental derangement. The charge and the defendant's pleas make up the issues on each count which you will determine by your verdicts.

* * *

INSTRUCTION NO. 5

On Count I of the Amended Information in this case, depending upon the evidence, you may find the defendant:

(a) Guilty of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree; or

(b) Not guilty by reason of insanity or mental derangement; or

(c) Not guilty.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged in Count I of the Amended Information are:

1. That on or about the 29th day of March, 1980, the defendant did kill Janet L. Mesner in Lancaster County, Nebraska;

2. That the defendant killed Janet L. Mesner while the defendant was:

   (a) Intentionally perpetrating a sexual assault in the first degree upon Janet L. Mesner, to-wit: by Randolph K. Reeves intentionally overcoming Janet L. Mesner by force and by intentionally subjecting her to sexual penetration; or

   (b) Intentionally attempting to perpetrate a sexual assault in the first degree upon Janet L. Mesner by intentionally engaging in conduct, to-wit: overcome Janet L. Mesner by force, which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

3. That at the time of killing Janet L. Mesner and at the time of the perpetration of or attempt to perpetrate a sexual assault in the first degree upon Janet L. Mesner the defendant was not insane.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction on Count I of the Amended Information.

The sanity of the defendant must be proved by the State beyond a reasonable doubt. Instruction Number *13* following separately discusses this material element.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree is true, it is your duty to find the defendant guilty of the crime of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree on Count I of the Amended Information. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty on Count I of the Amended Information.

The burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts.

On Count II of the Amended Information in this case, depending upon the evidence, you may find the defendant:

   (a) Guilty of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree; or

   (b) Not guilty by reason of insanity or mental derangement; or

   (c) Not guilty.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged in Count II of the Amended Information are:

1. That on or about the 29th day of March, 1980, the defendant, Randolph K. Reeves,

did kill Victoria L. Lamm in Lancaster County, Nebraska.

2. That the defendant killed Victoria L. Lamm while the defendant was:

   (a) Intentionally perpetrating a sexual assault in the first degree upon Janet L. Mesner, to-wit: by Randolph K. Reeves intentionally overcoming Janet L. Mesner by force and by intentionally subjecting her to sexual penetration; *or*

   (b) Intentionally attempting to perpetrate a sexual assault in the first degree upon Janet L. Mesner by engaging in conduct, to-wit: overcome Janet L. Mesner by force, which, under the circumstances as he believed them to be constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

3. That at the time of killing Victoria L. Lamm and at the time of the perpetration of or attempt to perpetrate a sexual assault in the first degree upon Janet L. Mesner the defendant was not insane.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction on Count II of the Amended Information.

The sanity of the defendant must be proved by the State beyond a reasonable doubt. Instruction Number *13* following separately discusses this material element.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree is true, it is your duty to find the defendant guilty of the crime of murder in the perpetration of or attempted perpetration of a sexual assault in the first degree on Count II of the Amended Information. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty on Count II of the Amended Information.

The burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts.

* * *

INSTRUCTION NO. 7

As pertains to the element of sexual assault in the first degree in the alleged offenses herein, an applicable statute of the State of Nebraska provides that any person who subjects another person to sexual perpetration and overcomes the victim by force, . . . is guilty of sexual assault in the first degree.

"Sexual penetration" as used in these instructions means sexual intercourse in its ordinary meaning. Sexual penetration, however slight, is further defined as the actor placing any part of the actor's body into the genital

opening of the victim's body which can be reasonably construed as being for non-medical or non-health purposes. Sexual penetration does not require the emission of semen.

"Actor" means a person accused of a sexual assault.

"Victim" as used in these instructions means a person alleging to have been sexually assaulted.

INSTRUCTION NO. 8

In regard to an alleged attempt to perpetrate a sexual assault in the first degree, the Statutes of the State of Nebraska in full force and effect at the time alleged in the Amended Information provided as follows:

(1) A person shall be guilty of an attempt to commit a crime if he:

(a) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime of sexual assault in the first degree.

(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course

of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

INSTRUCTION NO. 9

The intent with which an act is done is a necessary element of the crime of:

(a) Sexual assault in the first degree;

(b) Attempted sexual assault in the first degree;

and must be established by the evidence the same as any other material element beyond a reasonable doubt.

Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely if ever susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that defendant had the required intent. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at such time he had the criminal intent required by instructions Numbers *2, 5, 8, 12, 14*. If you

have any reasonable doubt with respect to either, you must find the defendant not guilty.

INSTRUCTION NO. 10

You are instructed that in a prosecution for homicide in the perpetration of or attempt to perpetrate a sexual assault in the first degree, as herein charged, proof of premeditation and deliberation or an intent to kill is not required.

The turpitude involved in the perpetration of or attempted perpetration of a sexual assault in the first degree takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for perpetration of or attempt to perpetrate a sexual assault in the first degree.

A homicide committed while perpetrating or attempting to perpetrate a sexual assault in the first degree is murder in the first degree even though no intent to commit homicide is alleged or proven.

INSTRUCTION NO. 11

You are instructed that in order to establish that a homicide was committed in the perpetration of or attempt to perpetrate a sexual assault in the first degree it is not necessary for the State to prove that the homicide

was committed before or during the actual perpetration of or attempted perpetration of a sexual assault in the first degree; a homicide is committed in the perpetration of or attempt to perpetrate a sexual assault in the first degree if it is committed in the res gestae of the perpetration of or attempted perpetration of a sexual assault in the first degree; that is, if the initial crime of perpetration of or attempt to perpetrate a sexual assault in the first degree and homicide were closely connected in point of time, place and causal relation, and were parts of one continuous transaction. It is for the jury to determine from the facts and circumstances in evidence; if these, and all the other essential elements in the case exists, and the same must be established by the State beyond a reasonable doubt.

* * *

INSTRUCTION NO. 13

The defendant contends that he was insane or mentally deranged at the time he is alleged to have committed the offenses charged in the Amended Information. Insanity is a defense recognized by law and the evidence relating thereto should be considered by you and weighed the same as any other evidence.

The burden is upon the State to establish the fact of defendant's sanity beyond a reasonable doubt.

If from all of the evidence you are convinced beyond a reasonable doubt that the defendant committed the act

or acts charged and that at the time of the commission of the alleged crime he was of sufficient mental capacity:

1. To understand what he was doing and the nature and quality of his act;

2. To distinguish between right and wrong with respect to it; and

3. To know that such act was wrong and deserved punishment,

then the defendant would be legally responsible for his acts and you should return a verdict of "guilty", although you might find that at the time he was suffering from some degree of insanity or impairment of the mind.

If from the evidence or lack of evidence in this case a reasonable doubt is raised in your minds as to the defendant's mental capacity at the time of the commission of the alleged crime:

1. To understand what he was doing and the nature and quality of his act; or

2. To distinguish between right and wrong with respect to it; or

3. To know that such act was wrong and deserved punishment,

it is your duty to find the defendant "not guilty by reason of insanity".

INSTRUCTION NO. 14

Ordinarily, voluntary drug intoxication or voluntary alcohol intoxication or a combination thereof is not justification or excuse for crime; but excessive intoxication by which a person is wholly deprived of reason may prevent having the intent charged.

If you find that the defendant was intoxicated, that fact should be considered by you, together with all the facts and circumstances in evidence, for the purpose of determining whether or not you have a reasonable doubt that defendant was at the time in question capable of having the intent charged in regard to the alleged perpetration of or attempt to perpetrate a sexual assault in the first degree.

* * *

INSTRUCTION NO. 16

"Reasonable doubt" is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be

mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

* * *

JURY INSTRUCTION # 29

INSTRUCTION NO. 29

You have nothing whatever to do with the punishment or disposition of the defendant in the event of his conviction or acquittal by reason of insanity. Therefore, in determining his guilt or innocence, you have no right to take into consideration what punishment or disposition he may or may not receive in the event of his conviction or in the event of his acquittal by reason of insanity.

GIVEN

/s/ D.E.D.
JUDGE DISTRICT COURT

(Found at page 274 of the Nebraska Supreme Court Transcript)

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff	)	Docket 56 Page 139
vs.	)	DEFENDANT'S REQUESTED INSTRUCTION NO. 1
RANDOLPH K. REEVES, Defendant	)	(Filed March 26, 1981)

On Count I of the information in this case, depending on the evidence, you may find the defendant:

a. Guilty of murder in the first degree; or

b. Guilty of murder in the second degree; or

c. Guilty of manslaughter; or

d. Not guilty by reason of insanity; or

e. Not guilty.

the material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the first degree are:

1. That the defendant, Randolph K. Reeves, killed Janet Messner;

2. That he did so in the perpetration of a sexual assault in the first degree against her by intentionally overcoming her by force and subjecting her to sexual penetration;

3. That he did so on or about March 29, 1980;

4. That he did so in Lancaster County, State of Nebraska;

5. That at the time of the killing, the defendant, Randolph K. Reeves, was not insane.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the first degree necessary for conviction.

The sanity of the defendant must be proven by the State beyond a reasonable doubt. Instruction No. ___ following, separately discusses this material element.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the first degree. On the other hand, if you find that the State has failed to prove beyond a reasonable doubt one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the first degree.

-B-

Alternatively, with respect to Count I of the information, depending on the evidence, you may find the defendant:

a. Guilty of murder in the first degree; or

b. Guilty of murder in the second degree; or

c. Guilty of manslaughter; or

d. Not guilty by reason of insanity; or

e. Not guilty.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the first degree under this alternate allegation of Count I are:

1. That the defendant killed Janet Messner.

2. That he did so in an attempt to perpetrate a sexual assault in the first degree against her by intentionally engaging in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by defendant to culminate in the crime of overcoming Janet L. Messner by force and subjecting her to sexual penetration.

3. That he did so on or about March 29, 1980.

4. That he did so in Lancaster County, State of Nebraska.

5. That at the time of the killing, the defendant, Randolph K. Reeves, was not insane.

The State has the burden of proving beyond a reasonable doubt each and everyone of the foregoing material elements of the crime of murder in the first degree necessary for conviction.

The sanity of the defendant must be proven by the State beyond a reasonable doubt. Instruction No. ___ following, separately discusses this material element.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true,

it is your duty to find the defendant guilty of the crime of murder in the first degree. On the other hand, if you find that the State has failed to prove beyond a reasonable doubt one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the first degree. You shall then proceed to consider the lesser included offense of murder in the second degree.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:

1. That the defendant, Randolph K. Reeves, caused the death of Janet L. Messner.

2. That he did so intentionally, but without premeditation.

3. That he did so on or about March 29, 1980.

4. That he did so in Lancaster County, State of Nebraska.

5. That at the time of the killing, the defendant, Randolph K. Reeves, was not insane.

The State has the burden of proving beyond a reasonable doubt each and everyone of the foregoing material elements of the crime of murder in the second degree necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the second degree, and you shall not then

consider the lesser included offense hereafter set forth in this instruction. On the other hand, if you find that the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the second degree. You shall then proceed to consider the lesser included offense of manslaughter.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of manslaughter are:

1. That the defendant, Randolph K. Reeves, killed Janet Messner

2. That he did so without malice, either upon a sudden quarrel or unintentionally, while Randolph K. Reeves was in the commission of some unlawful act.

3. That he did so on or about March 30, 1980.

4. That he did so in Lancaster County, State of Nebraska.

5. That at the time of the killing, the defendant, Randolph K. Reeves, was not insane.

The State has the burden of proving beyond a reasonable doubt each and everyone of the foregoing elements of the crime of manslaughter.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of manslaughter. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty

to find the defendant not guilty of the crime charged in Count I of the information.

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
One of his attorneys

N.J.I. 14.06, See comment.

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. RANDOLPH K. REEVES, Defendant.	))))))	Docket 56 Page 139 DEFENDANT'S REQUESTED INSTRUCTION NO. 2 (Filed March 26, 1981)

On Count II of the information in this case, depending on the evidence, you may find the defendant:

a. Guilty of murder in the first degree; or

b. Guilty of murder in the second degree; or

c. Guilty of manslaughter; or

d. Not guilty by reason of insanity; or

e. Not guilty.

* * *

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff vs. RANDOLPH K. REEVES, Defendant	))))))	Docket 56 Page 139 DEFENDANT'S REQUESTED INSTRUCTION NO. 3 (Filed March 30, 1981)

Ordinarily, voluntary intoxication is no justification or excuse for crime; but excessive intoxication by which a person is wholly deprived of reason may prevent having the intent charged.

If you find that the defendant was intoxicated, that fact should be considered by you, together with all the facts and circumstances in evidence, for the purpose of determining whether or not you have a reasonable doubt that defendant was at the time in question capable of having the intent charged.

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
One of his attorneys

N.J.I. 14.31

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff vs. RANDOLPH K. REEVES, Defendant	)	Docket 56 Page 139 DEFENDANT'S REQUESTED INSTRUCTION NO. 4 (Filed March 30, 1981)

You are instructed that under the law of this State, if the defendant is found guilty by reason of insanity or mental derangement, the Court shall forthwith (1) commit defendant to the care and custody of the Director of Medical Services for a period not to exceed 30 days, and (2) certify the verdict to the Mental Health Board of the County and order that Board to determine whether the person so acquitted is a mentally ill dangerous person and a fit subject for custody and treatment in a hospital.

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
One of his attorneys

§29-2203, R.R.S. 1943

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff vs. RANDOLPH K. REEVES, Defendant	)	Docket 56 Page 139 DEFENDANT'S REQUESTED INSTRUCTION NO. 5 (Filed March 30, 1981)

You must also consider defendant's claimed mental diminished capicity [sic] and take all the evidence into consideration in determining whether defendant had the mental capacity to form any of the specific mental states that are essential elements of murder in the first degree and sexual assault in the first degree.

In this respect you must consider all the evidence, or lack of evidence, to determine whether the defendant had such reduced mental capacity (whether caused by mental illness, mental defect, intoxication, mental retardation, or a combination thereof,) that he could not form such mental state.

If you have a reasonable doubt as to whether defendant was capable of forming such mental state, you must find the absence of such essential element.

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
One of his attorneys

REFERENCES:

Washington v. State, 165 Neb. 275, 85 N.W.2d 509
State v. Brown, 118 N.W.2d 332

Starkweather v. State, 167 Neb. 477, 93 N.W.2d 619
See, Judge Hugh Stuart's instruction #16-1/2, Simants murder case

Refused 3/31/81

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. RANDOLPH K. REEVES, Defendant.	)	Docket 56 Page 139 MOTION FOR NEW TRIAL

COMES NOW the defendant in the above case and respectfully moves the Court for an Order granting him a new trial herein for any one or more of the following reasons:

* * *

9. Failure to give instructions on lesser-included offenses deprived defendant of a fair trial and due process of law in that such failure enhanced the risk of an unwarranted conviction of a greater offense, contrary to *Beck v. Alabama*, ___ U.S. ___ (1980).

10. Defendant was denied equal protection of the laws by failure to include lesser-included offenses in the instructions to the jury, in that in all other criminal cases in this state, a criminal defendant is entitled to a lesser-included offense when there is evidence which produces a rational basis for a verdict acquitting a defendant of the offense charged and convicting him of the lesser offense. *State v. Tamburano*, 201 Neb. 703, 271 NW.2d 472 (1978), and also whenever some of the elements of the crime charged in the information without the addition of any elements irrelevant to the original charge, may constitute another crime of crimes, such other crime or crimes are

included with the crime charge. *State v. Johnsen*, 197 Neb. 216.

* * *

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
DENNIS R. KEEFE and
RICHARD L. GOOS,
His Attorneys

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff vs. RANDOLPH K. REEVES, Defendant	)	Docket 56 Page 139 OBJECTIONS TO IMPOSITION OF DEATH PENALTY (Filed May 27, 1981)

COMES NOW the defendant and respectfully shows to the court that there lawfully cannot nor should there be a death penalty imposed in this case, for any one or more of the following reasons:

* * *

9. The death penalty may not be imposed in this case because to do so would violate the defendant's right to have due process of law, inasmuch as the lesser-included offense of second degree murder, not to mention the lesser-included offense of manslaughter, was not given to the jury for their consideration, as required by Nebraska law as enunciated in *State v. Tamburano*, 201 Neb. 703 (1978), and *State v. Johnsen*, 197 Neb. 216. Under such circumstances the death penalty may not be imposed. *See, Beck v. Alabama*, ___ U.S. ___, 100 S.Ct. 2382, 65 L.Ed.2d 392, (1980).

* * *

RANDOLPH K. REEVES, Defendant

BY: /s/ Richard L. Goos
FOR: Dennis R. Keefe and
Richard L. Goos,
His Attorneys

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Relevant portions of the opinion of the United States District Court for the District of Nebraska are located at pages 17-20 of the Appendix to the Petition for Writ of Certiorari.

Randolph K. REEVES,
Appellee/Appellant

v.

Frank X. HOPKINS, Warden of the Nebraska Penal and Correctional Complex, Appellant/Appellee.

Nos. 95-1098, 95-1188.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 9, 1996.

Decided Dec. 24, 1996.

Rehearing and Suggestion for Rehearing
En Banc Denied Feb. 27, 1997.*

Following affirmance, 239 Neb. 419, 476 N.W.2d 829, of petitioner's convictions of murder and sentence of death, petitioner sought habeas corpus relief. The United States District Court for the District of Nebraska, Richard G. Kopf, J., 871 F.Supp. 1182, granted petition. State appealed. The Court of Appeals, 76 F.3d 1424, reversed. On remand, the District Court, 928 F.Supp. 941, granted petition. State appealed. The Court of Appeals, Beam, Circuit Judge, held that: (1) petitioner did not have due process right to notice and opportunity to be heard before affirmance of his sentence on postconviction appeal, but (2) petitioner had due process right to have jury instructed on second degree murder and manslaughter.

Affirmed in part and reversed in part.

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* Judge Fagg, Judge Wollman, and Judge Loken would grant the suggestion.

Bright, Circuit Judge, concurred separately and filed opinion.

J. Kirk Brown, Asst. Atty. Gen., Lincoln, NE, argued, for appellant.

Paula Hutchinson, Lincoln, NE, argued (Kent Gipson, Kansas City, MO, on the brief), for appellee.

Before BOWMAN, BRIGHT, and BEAM, Circuit Judges

BEAM, Circuit Judge.

Randolph Reeves was convicted of two counts of felony murder and sentenced to death. Following unsuccessful appeal and postconviction actions in Nebraska state court, Reeves was granted habeas corpus relief in federal district court. We reversed, but retained jurisdiction and remanded to the district court for findings on Reeves's remaining claims. The district court again granted the petition and vacated Reeves's death sentence. For the second time, the State appeals the district court's grant of the writ.

We conclude that the district court erred in its grounds for granting the writ. We also conclude, however, that the district court erred in deciding that Reeves was not entitled to a jury instruction on lesser included offenses, a violation of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). On this basis, we conditionally grant Reeves's petition for habeas corpus.

I. BACKGROUND

The facts of this case are set out fully in the Nebraska Supreme Court's opinion in Reeves's state appeal. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433, 438-40 (1984) ("*Reeves I*"). A summary, however, is in order.

On March 29, 1980, Reeves killed Janet Mesner and Victoria Lamm in a Quaker meetinghouse in Lincoln, Nebraska. Ms. Mesner and Reeves were friends, and were in fact related. Reeves, who had been drinking heavily and had ingested some peyote buttons, entered a window of the house and either sexually assaulted or attempted to sexually assault Ms. Mesner in her bedroom. In the course of the assault, Reeves stabbed Ms. Mesner seven times with a knife he had taken from the kitchen. When Ms. Lamm entered the room during the assault, Reeves stabbed her to death. Ms. Mesner was mortally wounded, but was able to find a telephone and dial 911. Ms. Mesner identified Reeves as her attacker before dying less than three hours later at a local hospital.

Reeves was charged with two counts of murder in the course of or while attempting a sexual assault in the first degree. *See* Neb.Rev.Stat. § 28-303. Reeves presented defenses of insanity and diminished capacity, but was convicted on both counts. Under Nebraska law, a first degree felony murder conviction carries possible sentences of life imprisonment or death. Neb.Rev.Stat. § 28-105(1). A three-judge sentencing panel sentenced Reeves to death. On appeal, the Nebraska Supreme Court held that the sentencing panel had failed to consider a mitigating factor and had improperly applied an aggravating factor in determining Reeves's sentence. *Reeves I*, 344 N.W.2d at

447-48. The court, however, reexamined the applicable factors and affirmed the death sentence. *Id.* at 448.

Reeves then pursued state postconviction remedies. The Nebraska Supreme Court again affirmed his sentence. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359, 388 (1990) ("*Reeves II*"). The United States Supreme Court, however, vacated *Reeves II* and remanded the case for reconsideration in light of its holdings in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). *Reeves v. Nebraska*, 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 409 (1990). On remand, the Nebraska Supreme Court once again affirmed Reeves's sentence. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829, 841 (1991) ("*Reeves III*").

Reeves then brought this federal habeas corpus action under 28 U.S.C. § 2254, raising forty-four claims. The district court granted relief on the ground that the Nebraska Supreme Court did not have authority under state law to independently reweigh aggravating and mitigating factors in affirming a death sentence. *Reeves v. Hopkins*, 871 F.Supp. 1182, 1202 (D.Neb.1994). The district court considered and rejected Reeves's claims related to jury instructions, including a claim that the trial court improperly denied his request to have the jury instructed on lesser included offenses of felony murder, in violation of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). *Reeves v. Hopkins*, 871 F.Supp. at 1205.[1] The court left unresolved seven of Reeves's claims.[2]

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[1] The court also rejected Reeves's claim 44, challenging the introduction at trial of Janet Mesner's statements identifying Reeves as her attacker. *Reeves v. Hopkins*, 871 F.Supp. at 1210. Reeves has not cross-appealed this determination.

[2] The court did not reach claims 5, 6, 26, 27, 34, 36, and 38.

On appeal we reversed, holding that the district court exceeded federal court authority in determining that Nebraska law did not authorize the Nebraska Supreme Court to reweigh aggravating and mitigating factors in capital cases. *Reeves v. Hopkins*, 76 F.3d 1424, 1427 (8th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 307, 136 L.Ed.2d 224 (1996). We did not reach Reeves's *Beck* claim, instead remanding and instructing the district court to make determinations on the claims it had not reached. *Id.* at 1430-31. We expressly noted that we retained jurisdiction on those issues decided by the district court that we had not reached, and would consolidate those issues with any future appeal. *Id.* at 1431.

On remand, the district court rejected all but one of Reeves's remaining claims. The court determined that the Nebraska Supreme Court had resentenced Reeves in *Reeves III* when it again affirmed the death penalty on remand from the United States Supreme Court, but violated due process by failing to give Reeves notice of resentencing and an opportunity to be heard. *Reeves v. Hopkins*, 928 F.Supp. 941, 965-66 (D.Neb.1996).[3]

The State appeals the district court's findings on the due process claim, and we agree that the court below erred on this issue. We also conclude, however, that Reeves's *Beck* claim is meritorious and that the district

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[3] The district court also concluded that our retention of jurisdiction in our prior decision rendered it without authority to consider Reeves's motion to submit new evidence of actual innocence. *Reeves v. Hopkins*, 928 F.Supp. at 976. Reeves appeals this conclusion. Because we grant the writ on other grounds, we need not reach this issue.

court improperly rejected this claim in its first decision in 1994.

II. DISCUSSION

In this section 2254 habeas corpus action, we review the district court's factual findings for clear error and its legal conclusions de novo. *Culkin v. Purkett*, 45 F.3d 1229, 1232 (8th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 127, 133 L.Ed.2d 76 (1995).

A. The Due Process Claim

The district court granted relief on claim 34 of Reeves's petition, in which Reeves claims that:

> The death penalty was unconstitutionally applied to Petitioner in that the Nebraska Supreme Court in resentencing Petitioner on remand denied Petitioner notice and an opportunity to be heard in violation of the Sixth and Eighth Amendments and the [Due Process] and Equal Protection Clauses of the Fourteenth Amendment.

Petitioner's First Amended Petition for Writ of Habeas Corpus, at 37-38.

Reeves's claim involves his state postconviction proceedings. After his convictions and sentences were affirmed on direct appeal in *Reeves I*, Reeves sought state postconviction remedies. In *Reeves II*, the Nebraska Supreme Court affirmed denial of postconviction relief. 453 N.W.2d at 388. On petition for writ of certiorari, the United States Supreme Court vacated *Reeves II* and remanded for "further consideration in light of *Clemons v. Mississippi*." *Reeves v. Nebraska*, 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 409 (1990). In *Clemons*, the Supreme Court had recently held that a death sentence based in part on an invalidly applied aggravating factor (which the Nebraska court found had occurred in Reeves's case) could be affirmed by an appellate court. If state law allows, an appellate court in such a case may either: (1) conduct a harmless error analysis; or (2) independently reweigh the applicable aggravating and mitigating circumstances. 494 U.S. at 750, 752, 110 S.Ct. at 1449, 1450.

Reeves claims that when the Nebraska court once again affirmed his sentence in *Reeves III*, this amounted to a reimposition of the death sentence. This "resentencing," Reeves argues, was done without Reeves being aware that he would be subject to such resentencing by the state court. He was thus unable to argue against imposition of the death penalty and was caught by surprise when the court affirmed the sentence, rather than remanding to a new sentencing panel. Reeves claims that this violated his rights under the Fourteenth Amendment to notice and an opportunity to be heard.

On remand, the Nebraska Supreme Court issued an order directing Reeves and the State to submit simultaneous briefs "covering the subject of the remand." Petitioner's Brief at 2. According to Reeves, his counsel was uncertain of the meaning of the phrase "the subject of the remand." Reeves's attorney filed a series of motions with the Nebraska court attempting to clarify the scope of the

issues before the court, most of which the court denied,[4] and unsuccessfully sought to clarify the scope of the remand at oral argument. The district court agreed with Reeves that he "was not provided with adequate notice that he would be sentenced to death." 928 F.Supp. at 961. The court reasoned that "[h]owever the 20-minute oral argument in *Reeves III* might otherwise be characterized, we know in retrospect that it was ultimately the one proceeding where it would be determined whether [Reeves's convictions] warranted the death penalty." *Id.* at 964.

We part ways with the district court on a fundamental premise: *Reeves III* simply was not the "one proceeding" where the state determined that Reeves's crimes "warranted the death penalty." *Reeves II* was Reeves's appeal of his unsuccessful *postconviction* attack on his convictions and sentence. After the sentencing panel originally imposed the death sentence, the Nebraska Supreme Court affirmed the sentence on direct appeal in *Reeves I*.[5]

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[4] The court granted Reeves's motion to extend oral argument to 20 minutes. The court denied, without comment, motions: (1) requesting notice if the court "intended to engage in resentencing on appeal"; (2) for an evidentiary hearing to present evidence relevant to resentencing; and (3) to set forth an order of procedure.

[5] Reeves argues that in *Reeves I*, the Nebraska court, after finding that an aggravating factor had been improperly applied by the sentencing panel, affirmed on the basis that some aggravating factors remained, rather than independently reweighing the mix of aggravating and mitigating factors as required by *Clemons*. We reject this contention. The court in *Reeves I* expressly noted "our analysis is not confined to a mere counting process of aggravating and mitigating circumstances

The United States Supreme Court's remand of *Reeves II* for reconsideration in light of *Clemons* did nothing to unsettle the prior conclusion in *Reeves I*.[6]

It is true that in *Reeves III* the Nebraska Supreme Court reviewed in some detail its thinking on the propriety of Reeves's sentence. The court reexamined the applicable aggravating and mitigating factors, and concluded that "[w]e have balanced the aggravating and mitigating factors anew and have determined that the aggravating circumstances outweigh any statutory or nonstatutory mitigating circumstances in this case. . . . Sentences of death remain the appropriate penalties for Reeves." *Reeves III*, 476 N.W.2d at 841. However, the court's review was not a "resentencing" because Reeves's sentence had never been voided. We agree with the State that the court's discussion was merely a recasting of its prior conclusions in light of the guidance offered by *Clemons*.

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but, rather, to a reasoned judgment as to what factual situations require the imposition of death and which of those can be satisfied by life imprisonment in light of the totality of the circumstances present." *Reeves I*, 344 N.W.2d at 448.

[6] Reeves's reliance on *Lankford v. Idaho*, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991), is misplaced. In *Lankford*, the original decision of the trial court imposing the death sentence violated due process because the defendant (and even the prosecution) did not know that the trial court was contemplating the death penalty, and neither side addressed it during the sentencing hearing. *Id.* at 114-17, 111 S.Ct. at 1726-28. Reeves, however, has been under a final sentence of death since 1984, when *Reeves I* affirmed his sentence. He cannot say that the affirmance of his sentence – for the third time – in *Reeves III* was a surprise.

We also reject Reeves's argument that the Nebraska Supreme Court's conclusion in *Reeves III* that it was authorized to reweigh aggravating and mitigating factors was a new rule that it announced simultaneous with its application to him. First, it should have been clear to Reeves since *Reeves I* that the state court believed it had authority to reweigh, since that is exactly what it did on direct appeal in that case. Second, the Nebraska Supreme Court had previously stated that it could "weigh[ ] anew the aggravating and mitigating circumstances . . . as permitted by *Clemons v. Mississippi*." *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352, 361 (1991). We reject Reeves's argument that the language in *Otey* is "summary" and does not articulate the court's power to reweigh under *Clemons*. In any event, since Reeves was not "resentenced" in *Reeves III*, his "new rule" argument is largely irrelevant.[7]

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[7] Reeves also argues that the decision in *Reeves III* should be treated as a resentencing because the State had, in prior filings in this habeas action, referred to it as such. It is true that a party cannot argue on appeal a legal theory directly contrary to the one advanced in district court. *Bissett v. Burlington Northern R.R.*, 969 F.2d 727, 732 (8th Cir.1992). We do not believe, however, that the State's mere use of the word "resentence" in discussing other issues in these proceedings constitutes advancement of a legal theory or position. Finally, Reeves asserts that in *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227, 229 (1993), the Nebraska Supreme Court itself referred to the "resentencing" it had done in Reeves's appeal. ("As indicated in *State v. Reeves* . . . , we have the authority to resentence by analyzing and reweighing the aggravating and mitigating factors of the case."). Again, we do not believe that semantic niceties change the nature of the remand in *Reeves III*. In any event, the court in *Moore* was referring to its decision in *Reeves I*, not *Reeves III*.

In sum, the Nebraska Supreme Court did not "resentence" Reeves in *Reeves III*. Reeves's sentence of death was made final when the court affirmed his convictions and sentence on direct appeal in *Reeves I*, and the remand of the court's determination in Reeves's postconviction proceedings did nothing to void that sentence. For these reasons, we reject Reeves's due process claim.

B. The *Beck* Claim

Reeves was charged with two counts of first degree murder under a felony murder theory, for killing during the course of a first degree sexual assault or attempted first degree sexual assault.[8] Under Nebraska law, first degree murder is punishable by either life imprisonment or by death. Neb.Rev.Stat. §§ 28-303, 28-105(1). Reeves requested, and was denied, jury instructions on second degree murder and manslaughter.[9] The jury was therefore

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[8] Reeves was charged under Neb.Rev.Stat. § 28-303, which provides that:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary
>
> . . . .

[9] The applicable statutory provisions are as follows:

> **§ 28-304. Murder in the second degree; penalty.**
>
> (1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

only instructed on the crime of first degree felony murder. Reeves argues that the refusal of his proposed instructions violated *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). We agree.

In *Beck*, the petitioner was tried on a single count of intentionally killing during the course of a robbery. *Id.* at 627, 100 S.Ct. at 2384. Under Alabama law, when a jury found a defendant guilty of this charge, it was required by statute to return a sentence of death. *Id.* at 628 n. 3, 100 S.Ct. at 2385 n. 3. The trial court, however, was the final sentencer and was free to impose the death sentence or a life term. *Id.* at 629 n. 4, 100 S.Ct. at 2385 n. 4. The statute under which Beck was charged expressly prohibited trial courts from giving instructions on lesser included noncapital offenses, even if the evidence would support a conviction on a lesser included offense. *Id.* at 628 & n. 3, 100 S.Ct. at 2385 & n. 3.

The Supreme Court held that in a capital case due process requires that the jury be given the option of convicting the defendant on a lesser included noncapital offense if the evidence would support conviction on that offense. *Id.* at 638, 100 S.Ct. at 2390. The Court in *Beck*

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§ 28-305. Manslaughter; penalty.

(1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an ~~unlawful act~~.

Second degree murder carries a maximum sentence of life imprisonment. *Id.* at §§ 28-304(2), 28-105(1). Manslaughter carries a maximum sentence of twenty years. *Id.* at §§ 28-305(2), 28-105(1).

sought to avoid presenting juries with a "death or nothing" choice between conviction of a capital crime and finding the defendant not guilty. Faced with such a choice, jurors might decide to acquit, even though they believed that the defendant had committed a crime. On the other hand, they might convict of the capital crime, even though they felt that the defendant did not deserve the death penalty. This choice, the Court explained, is unacceptable because "the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished." *Id.* at 642, 100 S.Ct. at 2392. This risk of such a choice "cannot be tolerated in a case in which the defendant's life is at stake." *Id. See also Schad v. Arizona*, 501 U.S. 624, 646, 111 S.Ct. 2491, 2504-05, 115 L.Ed.2d 555 (1991). As the Court later explained, "[t]he goal of the *Beck* rule . . . is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S.Ct. 3154, 3159-60, 82 L.Ed.2d 340 (1984).

The State argues that *Beck* is inapplicable because the Nebraska Supreme Court has determined that, under state law, there are no lesser included offenses of felony murder. Both before and after Reeves's conviction, the Nebraska court repeatedly made clear its view that in felony murder cases "it is error for the trial court to instruct the jury that they may find defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter." *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881, 883 (1974). *See also State v.*

Massey, 218 Neb. 492, 357 N.W.2d 181, 185-86 (1984) (quoting *Reeves I*, 344 N.W.2d at 442); *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116, 118 (1982); *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8, 14 (1976). We are directly faced, therefore, with the question whether the State's prohibition is consistent with *Beck*.

The State contends that once the Nebraska Supreme Court has determined that felony murder has no lesser included offenses, then Reeves's *Beck* claim necessarily fails. The State urges us to follow *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir.1991), in which the Ninth Circuit rejected an Arizona prisoner's *Beck* claim. The court in that case reasoned that "Greenawalt was tried solely for felony murder, a crime for which Arizona law recognizes no lesser included offense." *Id.* at 1029 (citing *State v. Greenawalt*, 128 Ariz. 150, 624 P.2d 828, 846 (1981)) (*en banc*). The court concluded on this basis that *Beck* was inapplicable.

We cannot agree with this interpretation of the *Beck* doctrine. The State's position would say in effect that *Beck* means only that a criminal defendant is entitled to instructions on lesser included offenses to which state law says he or she is entitled. But if this were true, then *Beck* itself would have been decided differently. In *Beck*, as in this case, state substantive law specifically prohibited the giving of a lesser included offense instruction. The problem was not merely a trial court's decision not to instruct the jury, nor was it Alabama's definition of lesser included offenses. The unacceptable constitutional dilemma was that state law *prohibited* instructions on noncapital murder charges in cases where conviction made the defendant death-eligible. The prohibition in

Reeves's case is based on the Nebraska Supreme Court's pronouncement of state law, rather than upon a statute. But there is no principled reason to distinguish such a prohibition imposed by the state courts from one imposed by the state legislature.[10] The constitutional violation is the same.

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[10] Similarly, the Fifth Circuit has held that the *Beck* doctrine imposes federal constitutional limits on state law governing when a trial court may refuse to give an instruction on a lesser included offense. *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir.1988). The court noted that "[i]f due process is violated because a jury cannot consider a lesser included offense that the 'evidence would have supported,' . . . the source of that refusal, whether by operation of state law or refusal by the state trial court judge, is immaterial." *Id.* at 767 n. 2 (citation to *Beck* omitted).

We note that in rejecting a petitioner's *Beck* argument in *Blair v. Armontrout*, we stated that "*Beck* does not prescribe a first-degree murder instruction in this case unless first-degree murder is a lesser-included offense of capital murder . . . and the [State] Supreme Court [has held] that first-degree murder [is] not a lesser-included offense of capital murder." 916 F.2d 1310, 1326 (8th Cir.1990). In *Blair*, however, we did not directly face the issue whether *Beck* could be vitiated by a state's determination that a particular crime has no lesser included offenses. There was no *Beck* violation in *Blair* because: (1) the jury had both the option and power to impose a life sentence, rather than a death sentence; and (2) the defendant *was* given jury instructions on both second degree murder and manslaughter. *Id.* Neither is true of this case.

We made a similar statement regarding a state's definitions of lesser included offenses in *Williams v. Armontrout*, 912 F.2d 924, 928 (8th Cir.1990) (*en banc*). In that case, however, *Beck* did not apply because the evidence would not have supported a conviction for the charge for which the defendant requested an instruction. *Id.* at 929. *Williams* was thus squarely within the

We believe that in arguing to the contrary, the State misreads the Supreme Court's clarifications of the *Beck* doctrine. In *Hopper v. Evans*, the Court held that under *Beck* "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." 456 U.S. 605, 611, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367 (1982) (emphasis in the original). In *Spaziano*, the Court held that *Beck* did not apply when the statute of limitations had run on all lesser included offenses and the defendant refused to waive the statute. 468 U.S. at 456-57, 104 S.Ct. at 3160-61. The Court stated that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. *Beck* does not require that result." *Id.* at 455, 104 S.Ct. at 3159.

The Ninth Circuit in *Greenawalt* cited *Spaziano* to support its conclusion that Arizona's nonrecognition of any lesser included offenses foreclosed a *Beck* claim. *Greenawalt*, 943 F.2d at 1029. We believe that this reads *Spaziano* much too broadly. In *Spaziano*, the defendant *could not have been convicted* of any lesser included offenses because the applicable statutes of limitation had all run and the defendant refused to waive them. The Court found that instructing the jury on a charge that could not have resulted in a conviction would compound the distortion of factfinding that troubled it in *Beck*:

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limitation on *Beck* clarified by *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 2052-53, 72 L.Ed.2d 367 (1982) (holding that *Beck* requires instructions on noncapital offenses only when the evidence would support a conviction on that charge).

> Requiring that the jury be instructed on lesser included offenses for which the defendant may not be convicted . . . would simply introduce another type of distortion into the factfinding process.
>
> . . . *Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice.

Id. at 455-56, 104 S.Ct. at 3160. *Spaziano* does not stand, therefore, for the proposition that state law can foreclose *Beck* claims by declaring that felony murder has no lesser included offenses; this is exactly what the Alabama legislature had done in *Beck*, after all.[11] *Spaziano* stands, rather, for the eminently sound notion that juries should not be mislead into "convicting" someone of a charge for which he or she cannot be convicted. There is no question of such trickery in this case. Reeves could have been convicted and sentenced for either second degree murder or manslaughter.

The State's rationale for prohibiting instructions for noncapital murder in felony murder cases further supports our conclusion. The Nebraska Supreme Court has said that felony murder differs from other murder

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[11] The State argues that "but for the specific statute struck down which prohibited such jury instructions [on lesser included offenses], there existed, under Alabama law, lesser included offenses of the crime with which Beck was charged." State's Reply Brief (1995) at 11-12. But this is merely to say that "if state law had not prohibited an instruction, it would have permitted it." This is, of course, true. But it is equally true of Nebraska law.

because it requires no showing of any intent to kill: "The turpitude involved in the [underlying felony] takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for [the underlying felony]." *Reeves I*, 344 N.W.2d at 442 (citations omitted). Thus, a finding that Reeves intended the underlying felony (actual or attempted first degree sexual assault) takes the place of any showing that Reeves intended to kill. At oral argument, the State reiterated that the difference between the mental states required for felony murder and premeditated first degree murder is the basis for the prohibition on lesser included offense instructions in felony murder cases.

There is nothing necessarily unconstitutional with the State's definition of the mental culpability required for a felony murder conviction. However, the *death penalty* cannot be imposed on a defendant without a showing of some culpability *with respect to the killing itself*. *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378-79, 73 L.Ed.2d 1140 (1982). Before a state can impose the death penalty, there must be a showing of both major participation in the killing and reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987). *Enmund* and *Tison* are thus independent constitutional requirements of the mental culpability a state must prove if it is to impose a *death sentence;* if the death sentence is to be imposed, the state must necessarily produce some evidence of intent with respect to the *killing*. Nebraska's rationale for prohibiting lesser included offense instructions in felony murder cases thus disappears when the defendant is sentenced to death. We

are led to the conclusion that the State may not, consistent with the Constitution, bar an instruction on noncapital homicide, in a felony murder case where the death sentence is imposed, on the basis that felony murder requires no showing of intent or, at least, a reckless indifference to the value of human life. To hold otherwise would mean that the State could avoid *Beck* by claiming that it need show no intent or reckless indifference with respect to the killing, yet could simultaneously avoid *Enmund* by adducing precisely such evidence.

We do not suggest that the State may not impose the death penalty pursuant to a felony murder conviction. We mean to say only that the State's prohibition on instructions on noncapital charges in felony murder cases is inconsistent with *Beck*, and that its rationale for the prohibition would put *Beck* at odds with *Enmund*. In *Greenawalt*, the Ninth Circuit reads *Enmund* to apply only in situations of "accomplice felony murder" where the Eighth Amendment requires a specific showing of mens rea before the death penalty may be imposed. 943 F.2d at 1028. We think this unduly narrows the Supreme Court's holdings in *Enmund* as well as *Tison*, especially in cases such as this. Reeves's insanity and diminished capacity defenses raise the same "mental state" concerns considered by the Court in both *Enmund* and *Tison;* indeed, the facts of this case and Reeves's defenses indicate the need for particular care that Reeves's "punishment . . . be tailored to his personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378.

The death penalty concerns expressed in *Enmund* and *Tison* lie at the core of the *Beck* doctrine. As the Court explained in *Hopper*, *Beck* teaches that the Eighth and

Fourteenth Amendments require that the death penalty must be "channeled so that arbitrary and capricious results are avoided." 456 U.S. at 611, 102 S.Ct. at 2052. We believe that Reeves's case comes within *Beck* and *Hopper*. The facts would have supported a conviction for either second degree murder or manslaughter, and unlike in *Spaziano*, Reeves could have been convicted and sentenced for those crimes. Instead, Reeves's jury was faced with a stark choice: convict Reeves of capital murder or acquit him altogether.[12] State law, whether expressed by a statute or by a court, may not prohibit an instruction on a noncapital charge that the evidence supports when the defendant is subsequently sentenced to death.[13] We

[12] Furthermore, the "death or acquit" dilemma may have been exacerbated in Reeves's case. Reeves presented an insanity defense, but the trial court refused to instruct the jury that an acquittal by reason of insanity would not have resulted in Reeves's release. In addition, the prosecutor erroneously told the jury in summation that an acquittal would mean that Reeves would "walk out of this courtroom a free man." While the district court was unsure whether the prosecutor's statement referred to Reeves's insanity defense or merely to the effect of an acquittal on the merits, the Nebraska Supreme Court stated in *Reeves I* that "the statement made by the prosecutor was not an entirely correct statement of the law." 344 N.W.2d at 443. While we agree with the district court that neither the refused insanity instruction nor the prosecutor's misstatement is sufficient in itself to violate due process, *infra* at 986, the effect could only have heightened the "death or acquit" dilemma.

[13] The State argues that *Beck* involved a statute that automatically imposed the death sentence, whereas Reeves's jury had no involvement in sentencing. But the Alabama statute in *Beck* was not a "mandatory death" statute; the judge had final sentencing authority, and was free to reject the death penalty. Furthermore, Reeves correctly argues that when *Beck* was

therefore hold that the trial court's refusal to grant Reeves's request for instructions on second degree murder and manslaughter violated *Beck v. Alabama*.

C. Reeves's Other Claims

The only claims Reeves presents on cross-appeal are those numbered 20, 20(a), 20(c), 22, and 23. We agree with the district court's dismissal of each of those claims.[14]

Claims 20 and 20(a): Reeves claims that the trial court erred in its instructions on his insanity defense and on the culpability the State needed to prove to establish the predicate felony (first degree sexual assault) of the felony murder charge. The district court rejected Reeves's argument that the trial court's instructions established invalid

decided, the Supreme Court had already declared "mandatory death" statutes unconstitutional in *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976). This case is like *Beck:* the jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him.

[14] In its 1994 order granting habeas, the district court considered and rejected Reeves's claims numbered 20, 20(a), 20(c), 22, 23, and 44. On remand after we reversed, the district court considered the remaining claims (claims 5, 6, 26, 27, 34, 36, and 38) that it had not reached in its first ruling. Claim 34 is the due process claim that the district court granted relief on, which we discuss and reject in part II.A. In the prior appeal before this court, Reeves did not cross-appeal the dismissal of claim 44, nor does he now cross-appeal the district court's conclusions on claims 5, 6, 26, 27, 36, and 38. Reeves has therefore abandoned those claims and we need not consider the district court's dismissal of them.

conclusive presumptions of fact and relieved the prosecution of its burden of proof of elements of the crime charged, in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). We agree with the district court that the trial court properly instructed the jury, and did not so shift the burden of proof.

Claim 20(c): Reeves claims that the failure to give an instruction on noncapital homicide in his case violated equal protection, because defendants charged with premeditated first degree murder are entitled to such an instruction under Nebraska law. We agree with the district court that Reeves did not fairly present this argument in state court, and that under Nebraska law Reeves has abandoned this claim. *See State v. Evans*, 215 Neb. 433, 338 N.W.2d 788, 795 (1983). Reeves has thus defaulted review of this claim in federal habeas proceedings, *Morris v. Norris*, 83 F.3d 268, 270 (8th Cir.1996), and has made no showing of cause to excuse his default. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506-07, 53 L.Ed.2d 594 (1977).

Claim 22: Reeves claims that the trial court erred by refusing his requested instruction on diminished capacity. We agree with the district court that the trial court's instructions on intoxication and insanity covered largely the same ground as the requested instruction, and that the refusal thus did not result in a miscarriage of justice. *Closs v. Leapley*, 18 F.3d 574, 579 (8th Cir.1994).

Claim 23: In rebuttal closing argument, the prosecutor told the jury that if "[t]he State doesn't prove this case beyond a reasonable doubt, then the State shouldn't win and this defendant should walk out of this courtroom a

free man." *Reeves v. Hopkins*, 871 F.Supp. at 1207. The trial court denied Reeves's motion for a mistrial based on this statement. Reeves asserts that this comment gave the jury the false impression that an acquittal on the basis of insanity would result in Reeves's release. This, Reeves argues, was so misleading as to unfairly prejudice his trial.

The district court noted that this reference was one sentence in the midst of a forty-eight minute argument, and occurred on a day where the jury heard more than four hours of argument from both the prosecution and defense. The court found that the context, ambiguity, and passing nature of the remark indicated little likelihood that it could have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Pickens v. Lockhart*, 4 F.3d 1446, 1453 (8th Cir.1993) (citations omitted). We agree that Reeves has not shown that this isolated remark constituted constitutional error.

D. Relief

Having found Reeves's *Beck* claim meritorious, we must still determine what relief is appropriate. We have previously held that *Beck* only applies in cases where the defendant is in fact sentenced to death. *Pitts v. Lockhart*, 911 F.2d 109, 112 (8th Cir.1990). The *Beck* violation in this case thus can be cured in one of two ways: (1) by granting Reeves a new trial; or (2) by resentencing Reeves to life imprisonment, which is a statutorily authorized sentence for felony murder.[15] We therefore find it appropriate to

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[15] *See* Neb.Rev.Stat. §§ 28-303, 28-105(1).

grant a conditional writ of habeas corpus: Reeves's conviction will be vacated subject to a new trial unless, within 180 days from the issuance of the mandate, his death sentence is modified to life imprisonment.

III. CONCLUSION

We find that the trial court's refusal to instruct the jury on noncapital murder charges violated *Beck v. Alabama*, and that the district court thus erred in dismissing Reeves's claim 20(b). We conditionally grant Reeves's petition for the writ of habeas corpus: his conviction will be vacated subject to a new trial unless the State resentences Reeves to life imprisonment within 180 days. Because we conclude that Reeves's due process argument is groundless, we reverse the district court's finding on claim 34. We affirm the district court's findings dismissing all of Reeves's other claims.

BRIGHT, Circuit Judge, concurring separately.

Judge Beam's well written opinion persuasively and logically explains that the application of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), requires that we remand this case for appropriate relief under a conditional writ of habeas corpus. I agree.

Having directed the issuance of a writ of habeas corpus, which will require the State of Nebraska either to retry Reeves or sentence him to life imprisonment, I would not reach the due process claim discussed in part II A of the court's opinion. In all other respects, I concur.

EIGHTH CIRCUIT ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-1098NEL
No. 95-1188NEL

Randolph K. Reeves, Appellee/Appellant, vs. Frank X. Hopkins, Appellant/Appellee.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Wollman, and Judge Loken would grant the suggestion.

The petition for rehearing by the panel is also denied.

February 27, 1997

Order Entered, at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit
